

A Tale of Two Unions

VB verfassungsblog.de/a-tale-of-two-unions/

Maximilian Steinbeis Sa 16 Jun 2018

Sa 16 Jun 2018

The Christian Democratic Union of Germany, the party of Adenauer, Kohl and Merkel, is, as the name suggests, a union: it joins what by itself would be separated. An association of paleo- and neo-liberals, conservatives, Christian trade unionists, Catholics and Protestants – all of whom have rather little in common except the intention of bringing "reasonable people" to power and keeping bedraggled, wild-eyed revolutionaries safely at bay. They are united by the insight that the constant fighting for faith, status and class interests doesn't get anybody anywhere in the end, so why don't we all sit down and be reasonable and do the sensible thing for our mutual benefit under the rule of law. That is basically what the CDU is about.

The European Union, too, joins what by itself would be separated. It binds some two dozen states to no longer consider each other as merely foreign countries where the damage of one equals the benefit of the other and vice versa. It depolarizes and depoliticizes the diverging national interests of its member states, who are no longer led into conflict or even war by bedraggled, wild-eyed revolutionaries exploiting these diverging interests, but instead sit down together and do the reasonable and sensible thing for their mutual benefit under the rule of law. This, obviously, makes a tremendous lot of sense to the CDU, which is why Europe is one of the few things that really defines its brand and identity core.

Now, it turns out that there are more and more people who are not wild-eyed and bedraggled or revolutionary at all, but nevertheless show no inclination to engage in joining what by itself would be separated. On the contrary. What's new about these guys is that they are from their own camp. These are people they used to sit down with and talk reasonably about sensible things. In the European People's Party. In the European Parliament. In their own federal government. In their own parliamentary group in the *Bundestag*. The Christian Social Union, the Bavarian sister party of the CDU, has thrown the governing coalition and the 70 years old CDU/CSU alliance into a deep and unprecedented crisis this week with its insistence that Germany must, just two weeks away from the EU summit, start immediately to unilaterally turn away refugees at the German borders. And they have made very clear what they find so attractive about it: "Germany must not wait forever for Europe, but must act independently," tweetet Markus Söder, the new Bavarian PM. The "time of multilateralism" is about to end and will be succeeded by "individual countries that also make decisions". One must now mind "one's own population and not always just the whole of Europe".

The CDU has a very robust stomach. But there are things that even she cannot swallow without peril. What the CSU has dished up for her this week is one of them.

The rule of lawlessness

To start turning away asylum seekers at the German border just like that would be a clear violation of European law. I do not know of one single expert on asylum and migration law in Germany who takes a different view. (Retired constitutional judges and law professors with other areas of expertise do not automatically count as such, as even the most self-confident legal scholar will not easily penetrate the notoriously complicated field of European migration law just by flipping through the German Asylum Act.) Admittedly, it is not entirely trivial to see why and how that is so, especially since the German asylum law seems to suggest otherwise. But that is what we have experts for. They can explain that quite compellingly, and have in fact done so innumerable times over the last three years, not a few of them on these pages. *Ad nauseam*, to be honest. (As Katrin Göring-Eckardt, the Green parliamentary chairwoman, recently recommended to the FDP and the AfD in the plenary debate of the *Bundestag*: "At least read the Verfassungsblog!")

Above all, it gets a lot easier to understand what makes unilateral rejection so problematic when you do what a party as Europe-infused as the CDU should do automatically, namely look at the situation from the European perspective. Rejecting refugees at the border means: We won't check your rights. We won't hear your case. We don't want to know whether you are a victim of torture, whether you have been mistreated on your way here, and where and by whom, whether your wife and children already have asylum in Germany, who you are and what your story is – that's all not our problem. If you came to us from Austria, then go back there – not our problem. And if Austria sends you on because you were in Hungary before, and from there to Serbia, Macedonia, Greece, Turkey all the way back to Bashar Al-Assad's doorstep – not our problem. If irregular Idomeni-style camps emerge at some godforsaken border place, with people drowning in mud and freezing to death – not our problem. Because as Markus Söder put it so beautifully: We need to "mind our own population."

Perhaps the CSU has just entangled itself in its own desperate shenanigans to improve its shot for a popular majority at the Bavarian regional elections in fall. It's hard to see how they should get out of this undamaged. Angela Merkel for one seems determined to call the CSU's bluff. And that might be a good thing. Perhaps a good, clear, resounding break with the CSU would be a blessing for the union – for both unions. In less than a year, European elections will take place, and CSU man Manfred Weber seems to be working hand in hand with Viktor Orbán to get himself appointed as *Spitzenkandidat* of the European People's Party in order to become the next Commission President. What if the CDU would no longer have to go along with this? What if they were free to, who knows, forge a new alliance with Emmanuel Macron's *En Marche*? Perhaps a rejuvenated CDU, with people like Annegret Kramp-Karrenbauer, Peter Altmaier, Daniel Günther, Armin Laschet at the helm, could even gather a dynamic new pro-European movement around themselves? A movement which might also include some of the less Putinism-infected Social Democrats looking for a new home after the abject demise of the doomed SPD, such as Heiko Maas, the current Foreign Secretary who has just given a rather sensational speech on Europe, or Minister of Finance Olaf Scholz, who seems to warm to the idea of a European unemployment insurance? What if the presumably still existing EU-sympathetic majority in Germany could be galvanized and mobilized in a way that would finally hand the CSU and AfD Trumpists and Orbanites the crushing defeat they so thoroughly deserve?

Yes, I know, I know. I'm dreaming. Don't wake me up just yet.

Refugees in orbit

By the way: the campaign I started last week to crowdfund the upcoming relaunch of Verfassungsblog has produced almost 100 supporters, so far – which, I'd cautiously say, is a start. If you appreciate our work, it would be great if you could make up your mind to support us, too. It doesn't take long and doesn't cost much at all. But it makes a big difference to us. So, please click [HERE](#).

DANA SCHMALZ has earned great merits for herself by informing the white-hot debate on asylum law in **Germany** this week with a very cool and articulate two-part article which firstly shows how turning away asylum seekers at the border would be against European and international law, and secondly, why (German).

What it looks like when a far-right government minds just "their own population" could be experienced this week on the Mediterranean where a rescue ship with 600 refugees on board was kicked back and forth between **Malta** and **Italy** like a rag ball and "rejected" by both. For [JAMES HATHAWAY](#), the villain in this game is not only Italy's new ultranationalist Home Secretary Salvini, but the *status quo* in international refugee law, which places the responsibility for refugee protection solely on the state the refugee reaches first.

[MEIKE RIEBAU](#) and [NEREA GONZÁLEZ MÉNDEZ DE VIGO](#) are unhappy with the **German** government plan to barrack new asylum seekers in so-called *Ankerzentrum* camps (German).

This week, the Federal Constitutional Court confirmed the **German** ban on civil servant strikes as constitutional, although the European Court of Human Rights considered such regulations problematic. [JOSEF LINDNER](#) finds the decision "clear and stringent", and [MARTEN BREUER](#) argues that the FCC managed to achieve a clever balance with Strasbourg (both German).

Verfassungsblog has never before put a fully worked-out draft bill up for discussion. We are proud to do just that with a law drafted by [ALEXANDER PEUKERT](#): It's an amendment of the controversial **German** *Netzwerk-Durchsetzungs-Gesetz* (network enforcement law) which aims to hold social media platforms responsible for illegal user content but fails to equally protect the users' freedom of expression and information. Peukert's draft shows how this could be remedied (German).

The governing parties in **Germany**, CDU/CSU and SPD, hope to help themselves to a massive chunk of state party financing, by means of a draft law which [SOPHIE SCHÖNBERGER](#) finds blatantly unconstitutional. [HEIKE MERTEN](#) considers the proposal of the far-right AfD to provide for a sound legal basis for the funding of party foundations justified as such (both German).

Germany has been elected to the UN Security Council for the next two years and has campaigned by stressing its will to help strengthening international law – which would be even more impressive, as [HANNAH BIRKENKÖTTER](#) notes, if Germany hadn't condoned Trump's air strikes in Syria, for example (German).

In **Turkey**, a signatory of the "Academics for Peace" appeal has been handed a prison sentence for making use of her freedom of expression which is still protected under Turkish constitutional and international law. [BASAK CALI](#) examines how the Turkish criminal court tried to wriggle around that legal obstacle to throw the protestor in jail nevertheless.

In **Poland**, the government is as unimpressed by the ongoing "dialogue" with EU Commission on the subjugation of the formerly independent Polish judiciary as ever. [TOMASZ KONCEWICZ](#) is not surprised by that and refers to a long-forgotten ECJ ruling from which much can be learned for the struggle for the rule of law in Poland.

In his book "Why Law Matters" recently published in German, [ALON HAREL](#) advocates "robust constitutionalism", and [KAI MÖLLER](#) places Harel's theses in a larger context of legal theory (both in German).

In the **United Kingdom**, the House of Commons voted down most of the amendments to the EU Withdrawal Act by which the House of Lords tried to prevent the worst. [JOELLE GROGAN](#) examines what this means.

[MARTIJN VAN DEN BRINK](#) analyses last week's epochal ECJ *Coman* judgement about the obligation of EU member states to recognize same sex marriages from abroad.

And the glossator [FABIAN STEINHAUER](#) writes in the first person singular (German).

Elsewhere

[SILKE RUTH LASKOWSKI](#) reports on a constitutional complaint before the **German** *Bundesverfassungsgericht* with the aim of establishing gender parity in parliament (German).

[DIRK VOORHOF](#) analyses a ruling by the European Court of Human Rights on the balance between freedom of expression and the fight against hate speech in a **Russian** case.

[THOMAS EHRHARD](#) is sceptical whether the planned electoral reform in **France** will really make the parliament more efficient and representative (French).

[ANTHONY SFEZ](#) is not so sure whether the constructive vote of no confidence by which Pedro Sánchez became the new Prime Minister of **Spain** was all that constructive after all (French).

[VINCENZO MIRI](#) examines the judgment of the Court of Cassation on the status of same-sex marriage in **Italy** (Italian).

[JAKE RICHARDS](#) explains the ruling of the **British** Supreme Court on the Northern Irish abortion ban.

Wow, this was another amazing week. We posted up to five articles on one day. That's a lot to digest. If you find that you can't keep up with all the new posts on Verfassungsblog – we won't object. Neither can we, to tell the truth. We really need that relaunch to improve the layout of our site. And we need reinforcement. To give us your support, please click [HERE](#). Thanks a million!

All the best and a successful week to you,

Max Steinbeis

LICENSED UNDER CC BY NC ND

SUGGESTED CITATION Steinbeis, Maximilian: *A Tale of Two Unions*, *VerfBlog*, 2018/6/16, <https://verfassungsblog.de/a-tale-of-two-unions/>.